

STATE OF RHODE ISLAND & PROVIDENCE PLANTATIONS
PROVIDENCE, Sc.
SIXTH DIVISION

DISTRICT COURT

Kent County Water Authority :
 :
v. : **A.A. No. 2012 - 71**
 :
Department of Labor and Training, :
Board of Review :
(Randy Peixinho) :

ORDER

This matter is before the Court pursuant to § 8-8-16.2 of the General Laws for review of the Findings & Recommendations of the Magistrate.

After a de novo review of the record and the memoranda of counsel, the Court finds that the Findings & Recommendations of the Magistrate are supported by the record, and are an appropriate disposition of the facts and the law applicable thereto.

It is, therefore, ORDERED, ADJUDGED AND DECREED, that the Findings & Recommendations of the Magistrate are adopted by reference as the Decision of the Court and the Employer's Appeal is DISMISSED AS MOOT.

Entered as an Order of this Court at Providence on this 25th day of October, 2012.

By Order:

/s/
Stephen C. Waluk
Chief Clerk

Enter:

/s/
Jeanne E. LaFazia
Chief Judge

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FINDINGS & RECOMMENDATIONS

Montalbano, M. Kent County Water Authority filed the instant complaint for judicial review of a final decision of the Board of Review of the Department of Labor and Training, which held that Randy Peixinho was entitled to receive employment security benefits because he was discharged under non-disqualifying circumstances under the provisions of Section 28-44-18 of the Rhode Island Employment Security Act. Jurisdiction for appeals from the decision of the Department of Employment and Training Board of Review is vested in the District Court by Gen. Laws 1956 § 28-44-52. For the reasons explained below, because Kent County Water Authority does not pay employment security taxes, and, therefore, is considered non-contributing (self-insured), and because the claimant is no longer collecting employment security benefits from the

Kent County Water Authority, claimant's benefits having been exhausted on August 27, 2012, I recommend that this appeal be dismissed as it is moot.

I. FACTS & TRAVEL OF THE CASE

The facts and travel of the case are as follows: Randy R. Peixinho (hereinafter referred to as "claimant") was employed by the Kent County Water Authority (hereinafter referred to as "employer") as a laborer for approximately eighteen years. He last worked on August 26, 2011. In September of 2010 the claimant was placed on a three-year probation for soliciting private work from a customer in violation of employer's policy. Any violation of the probation was to result in claimant's termination. The Referee made the following additional findings of fact:

*** On August 25, 2011, the claimant was observed in his company vehicle returning from a jobsite by two of his managers. The tailgate of the company vehicle was down and, therefore, items in the back of the vehicle were not secured. The employer observed items being blown out of the vehicle into traffic. The employer spoke with the claimant upon his return to the worksite. The claimant was issued a warning memo on that date as his actions were a violation of the employer's safety policy and their code of conduct. The claimant states that he believed he had secured the tailgate prior to operating the vehicle. The employer representative states that he checked the vehicle and if the tailgate had been properly secured, it would not have come down. The claimant was discharged on August 26, 2011 due to the policy violations and the violation of the terms of his probation.

Decision of Referee, October 20, 2011 at 1.

The claimant filed a claim for employment security benefits on September 1, 2011. On September 9, 2011, the Director determined that the claimant was eligible for

benefits because he was not discharged for disqualifying reasons under Section 28-44-18 of the Rhode Island Employment Security Act (hereinafter “the Act”). The employer filed a timely appeal to the Board of Review (Hereinafter “the Board”).

A hearing was held before Referee Carol A. Gibson on October 18, 2011. Claimant testified, as did John Duchesneau and Timothy Brown acting as the employer’s witnesses. On October 20, 2011 Referee Gibson reversed the decision of the Director, finding that claimant was discharged under disqualifying circumstances under the provisions of Section 28-44-18 of the Act. Decision of Referee, October 20, 2011 at 3. On October 28, 2011 the claimant filed a timely appeal to the Board. The Board reversed the decision of the Referee on February 29, 2012, finding that the claimant was discharged under non-disqualifying circumstances under the provision of Section 28-44-18 of the Act. Decision of Board of Review at 2. The claimant received his remaining benefits from February 29, 2012 until his benefits were exhausted on August 27, 2012. The employer is a self-insured governmental entity. Employer filed a timely appeal to the Sixth Division District Court on March 23, 2012.

II. APPLICABLE LAW

This case involves the application and interpretation of the following provision of the Rhode Island Employment Security Act, which specifically addresses misconduct as a circumstance which disqualifies a claimant from receiving benefits; Gen. Laws 1956 § 28-44-18, provides:

28-44-18. Discharge for misconduct. — An individual who has been discharged for proved misconduct connected with his or her work shall become ineligible for waiting period credit or benefits for the week in which that discharge occurred and until he or she establishes to the satisfaction of the director that he or she has, subsequent to that discharge, had at least eight (8) weeks of work, and in each of that eight (8) weeks has had earnings of at least twenty (20) times the minimum hourly wage as defined in chapter 12 of this title for performing services in employment for one or more employers subject to chapters 42-44 of this title. Any individual who is required to leave his or her work pursuant to a plan, system, or program, public or private, providing for retirement, and who is otherwise eligible, shall under no circumstances be deemed to have been discharged for misconduct. If an individual is discharged and a complaint is issued by the regional office of the National Labor Relations board or the state labor relations board that an unfair labor practice has occurred in relation to the discharge, the individual shall be entitled to benefits if otherwise eligible. For the purposes of this section, “misconduct” is defined as deliberate conduct in willful disregard of the employer’s interest, or a knowing violation of a reasonable and uniformly enforced rule or policy of the employer, provided that such violation is not shown to be as a result of the employee’s incompetence. Notwithstanding any other provisions of chapters 42-44 of this title, this section shall be construed in a manner that is fair and reasonable to both the employer and the employed worker.

In the case of Turner v. Department of Employment and Training, Board of Review, 479 A.2d 740, 741-42 (R.I. 1984), the Rhode Island Supreme Court adopted a definition of the term “misconduct,” in which they quoted from Boynton Cab Co. v. Newbeck, 237 Wis. 249, 259-60, 296 N.W. 636, 640 (1941):

‘Misconduct’ * * * is limited to conduct evincing such willful or wanton disregard of an employer’s interest as is found in deliberate violations or disregard of standards of behavior which the employer has the right to expect of his employee, or in carelessness or negligence of such degree or recurrence as to manifest equal culpability, wrongful intent or evil design, or to show an intentional and substantial disregard of the employee’s duties

and obligations to his employer. On the other hand mere inefficiency, unsatisfactory conduct, failure in good performance as the result of inability or incapacity, inadvertencies or ordinary negligence in isolated instances, or good faith errors in judgment or discretion are not to be deemed 'misconduct' within the meaning of the statute.

The employer bears the burden of proving by a preponderance of evidence that the claimant's actions constitute misconduct as defined by the law.

STANDARD OF REVIEW

The standard of review is provided by R.I. Gen. Laws § 42-35-15(g), a section of the state Administrative Procedures Act, which provides as follows:

42-35-15. Judicial review of contested cases.

(g) The court shall not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact. The court may affirm the decision of the agency or remand the case for further proceedings, or it may reverse or modify the decision if substantial rights of the appellant have been prejudiced because the administrative findings, inferences, conclusions, or decisions are:

- (1) In violation of constitutional or statutory provisions;
- (2) In excess of the statutory authority of the agency;
- (3) Made upon unlawful procedure;
- (4) Affected by other error of law;
- (5) Clearly erroneous in view of the reliable, probative and substantial evidence on the whole record; or
- (6) Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

Thus, on questions of fact, the District Court “* * * may not substitute its judgment for that of the agency and must affirm the decisions of the agency unless its findings are

‘clearly erroneous.’”¹ The Court will not substitute its judgment for that of the Board as to the weight of the evidence on questions of fact.² Stated differently, the findings of the agency will be upheld even though a reasonable mind might have reached a contrary result.³

The Supreme Court of Rhode Island recognized in Harraka v. Board of Review of Department of Employment Security, 98 R.I. 197, 200, 200 A.2d 595, 597 (1964) that a liberal interpretation shall be utilized in construing and applying the Employment Security Act:

* * * eligibility for benefits is to be determined in light of the expressed legislative policy that “Chapters 42 to 44, inclusive, of this title shall be construed liberally in aid of their declared purpose which declared purpose is to lighten the burden which now falls upon the unemployed worker and his family.” G.L. 1956, § 28-42-73. The legislature having thus declared a policy of liberal construction, this court, in construing the act, must seek to give as broad an effect to its humanitarian purpose as it reasonably may in the circumstances. Of course, compliance with the legislative policy does not warrant an extension of eligibility by this court to any person or class of persons not intended by the legislature to share in the benefits of the act; but neither does it permit this court to enlarge the exclusionary effect of expressed restrictions on eligibility under the guise of construing such provisions of the act.

¹ Guarino v. Department of Social Welfare, 122 R.I. 583, 584, 410 A.2d 425 (1980) citing R.I. Gen. Laws § 42-35-15(g)(5).

² Cahoone v. Board of Review of the Department of Employment Security, 104 R.I. 503, 506, 246 A.2d 213 (1968).

³ Id.

This case also involves a threshold question: whether employer's appeal presents a justiciable issue for review by the District Court in light of Gen. Laws 1956 § 28-44-40 and Gen. Laws 1956 § 28-44-50.1, both set forth in Section V of these findings and recommendations.

IV. ISSUE

The threshold issue before the Court is whether employer's appeal to the District Court presents the Court with a justiciable issue, or whether the appeal is moot since the employer is self-insured and claimant's benefits were exhausted after the decision of the Board of Review was rendered on February 29, 2012.

V. ANALYSIS

Rhode Island General Laws § 28-44-40 provides as follows:

28-44-40. Payment of benefits pending appeal. – If an appeal is filed by an employer, benefits shall be paid to an eligible claimant until that employer's appeal is finally determined. If the employer's appeal is finally sustained, no further benefits shall be paid to the claimant during any remaining portion of the disqualification period. Any benefits paid or payable to the claimant shall not be recoverable in any manner.

In this case the Board determined on February 29, 2012 that claimant was discharged by the employer under non-disqualifying circumstances under the provisions of Section 28-44-18 of the Act. At that point in time claimant resumed the collection of benefits under the Act, and benefits were paid to claimant during the pendency of employer's appeal to the District Court until said benefits were exhausted on August 27,

2012. Claimant's Brief at 8. Employer is a self-insured governmental entity. Employer does not pay employment security taxes. Regardless of whatever ruling this Court would make on the merits of employer's appeal, employer's status would not change. No funds would be returned to the self-insured employer under the Employment Security Act because the employer has not elected to pay into the employment security fund. The employer's account would not be credited since it has no account. The instant appeal is moot – there is nothing to be gained nor any relief to be had by the employer from further proceedings. See City of Cranston v. RI Laborers' District Council, Local 1033, 960 A.2d 529 (2008).

Furthermore, a decision on the merits of employer's appeal to the District Court would not be binding upon or determinative of any issue of fact or law in any other proceeding. See Rhode Island General Laws § 28-44-50.1 which provides as follows:

28-44-50.1 Limits of board of review legal precedent.

Except as provided in § 28-44-50, the findings of fact, conclusions of law, and determinations of eligibility of the director or the board of review, including decisions reviewed by the district, superior, or supreme courts, shall not be binding upon, or determinative of any issue of fact or law, in any criminal prosecution or civil action or administrative proceeding, other than the proceeding under this chapter in which the said findings, conclusions, or determinations were made. Notwithstanding the foregoing, documents and testimony developed in proceedings before the department, as well as any determinations of eligibility of the director or board of review, shall remain subject to subpoena, discovery, and admission as evidence in other proceedings as determined in those proceedings, including criminal prosecutions, civil actions, and administrative proceedings.

